IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 76-287

* * *

G. L. (PETE) HOWELL, ET AL.
Appellants

V.

MANUEL DeBUSK, ET AL.,
Appellees

* * *

* * *

MOTION TO AFFIRM

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

P.O. Box 12548
Austin, Texas 78711

EARL LUNA
Attorney at Law
1002 Dresser Building
1505 Elm Street
Dallas, Texas 75201

Attorneys For Appellees

September, 1976

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CODES & STATUTES:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 76-287

* * *

G. L. (PETE) HOWELL, ET AL.,
Appellants

V.

MANUEL DeBUSK, ET AL.,
Appellees

* * *

MOTION TO AFFIRM

* * *

TO THE SUPREME COURT OF THE UNITED STATES:

NOW COME Appellees and, pursuant to Rule 16, Rules of the Supreme Court, move the Court to affirm the judgment of the court below on the ground that it is manifest that the questions on which the cause depends are so insubstantial as not to need further argument.

STATEMENT

Appellants Howell and Shafer attempted to qualify as candidates in the 1976 Democratic Party primary in Dallas County, Texas, by submitting nominating petitions in lieu of paying filing fees, as authorized by Article 13.08, Texas Election Code (Appendix C, Jurisdictional Statement). The petitions, however, were defective in that the certificates of the circulators were

not duly notarized and thus were not "affidavits" as required by Article 13.08 (d). Primary opponents of Appellants Howell and Shafer brought suit, and a state court found the affidavit requirement to be mandatory.[1] Party and state officials, Appellees herein, were then ordered to remove the names of Howell and Shafer from the ballot. Howell and Shafer, along with qualified voters who wished to vote for them, then filed this suit, alleging that Article 13.08 of the Texas Election Code was unconstitutional. A three-judge district court found that the challenged statute violated neither the Fourteenth nor the First Amendment (Appendices A and B, Jurisdictional Statement) and denied all relief.

ARGUMENT

1. COLLATERAL ESTOPPEL

Appellants' contention that the 1976 requirements for nominating petitions are unreasonable and unnecessary as a matter of law merely because there were fewer such requirements in 1972 was dismissed by the trial court because it "was not advanced at trial and borders on the frivolous." This conclusion is clearly correct.

On February 3, 1972, the Secretary of State of the State of Texas was faced with a grave and immediate problem: Filing fees--the only legal method to control the number of candidates on the ballot and to finance the primary elections--had twice been struck down as unconstitutional. *Carter v. Dies*, 321 F.Supp. 1358 (1970); *Johnston v. Luna*, 338 F.Supp. 355 (1972). The Texas Legislature would not be convened in regular

[1]At no time during this state litigation did Howell or Shafer challenge the constitutionality of any statute; thus, the state courts were denied the opportunity to consider the questions raised herein, just as this Court was deprived of the ability to review any decisions of those courts adverse to the constitutional claims of Appellants.

session until the next year and thus could not attempt to enact a constitutional scheme in time for the May, 1972, primaries. To deal with this emergency, the Secretary of State petitioned the *Johnston* court to amend its order of January 20, 1972, to allow the promulgation of rules and regulations for primary elections. Pursuant to this amended order (Appendix F, Jurisdictional Statement), a schedule of filing fees, along with procedures concerning nominating petitions, were imposed by the Secretary of State. (Appendix G, Jurisdictional Statement.) Contrary to Appellants' assertion, this schedule was not *approved* by the *Johnston* court; rather, that court merely denied a motion to strick down the newly authorized filing fees and nominating petitions imposed and refused to grant Plaintiffs' request that the Secretary of State be prevented from imposing further filing fees and nominating petitions without prior approval of the Court. (Appendix H, Jurisdictional Statement.)

Appellants are now attempting to construe the latter order as an eternal freeze of the State's ability to control access to party primary ballots! Their efforts to convince the three-judge court below that, on the merits, the new filing fees and nominating petitions were unconstitutional were soundly rejected, so they now attempt to concumvent the equal protection analysis (and to shift the burden of proof to the State) by reaching for the doctrine of *res judicata*, a principle wholly inapplicable when the second suit involves a different factual and legal basis than present in the first.

This Court has consistently recognized that the State "has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. *Jenness v. Fortson*, 403 US. at 442, 29 L.Ed.2d at 652." *Bullock v. Carter*, 405 U.S. 134,145 (1972). The State of Texas, by now ensuring that persons

who sign a nominating petition are registered voters and members of the candidate's political party, is attempting to fulfill this responsibility within constitutional guidelines and surely is not precluded from so doing by the unfortunate occurences of the past.[2]

2. THE FIRST AMENDMENT

Article 13.08 in no way inhibits a voter from associating with the political party of his or her choice, but merely demands that persons who sign a petition to aid a candidate desiring to run in a party primary become members of that political party for the voting year. This restriction clearly furthers the valid state goal of preserving the integrity of the electoral process by confining voters "to supporting one party and its candidates in the course of the same nominating process." *American Party of Texas v. White*, 415 U.S. 767, 786 (1974). Nor is the statutory language vague. In resolving vagueness questions, this Court has recognized that "there are limitations in the English language with respect to being both specific and manageably brief" and accordingly has held that, when a statute is set out in terms that an ordinary person exercising ordinary common sense can sufficiently understand, it will be upheld. *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). See also *United States v. Vuitch*, 402 U.S. 62 (1971). An ordinary person, when reading the statement at the head of the petition, would realize that he was binding himself as a member of a political party for that

[2]Indeed, this Court, in *American Party of Texas v. White*, 415 U.S. 767 (1974), recognized both the 1972 and the 1974 legislative responses to its decision in *Bullock v. Carter*, 405 U.S. 134 (1972).

voting year. A person with ordinary common sense need not speculate as to the clear meaning of this promise. That Appellants have suggested marginal situations in which a few persons might have doubts in no way threatens the validity of the statute. *United States v. Harris*, 347 U.S. 612, 618 (1954).

Article 13.08(d) requires that the person who circulated a petition swear that he witnessed each voter's signature. By so swearing, the circulator necessarily reveals his identity. Appellants argue that this constitutes an invalid restraint on free expression. The State has a compelling interest, however, to ensure that a nominating petition reflects the desires of the signers and is not a fictitious document. An affidavit requirement is the least restrictive method, if not the only viable one, to ensure that the petition is not fictitious and was in fact signed by eligible, registered voters. Claims of Appellants that this requirement is unduly burdensome approach the frivolous and are totally unsupported by any evidence.

3. THE FOURTEENTH AMENDMENT

Even more frivolous is the argument that requiring the circulator to read a statement to each signer before the petition is signed creates an impermissible presumption of illiteracy. The statement itself does no more than explain to a potential signer what the law is. Such requirement is to the benefit of the signer, for it ensures that he is aware of the ramifications of his actions, and to the benefit of the candidate, for it avoids the possible voiding of signatures of ineligible signers. By requiring that the circulator call each signer's attention to the statement, the State is aiding candidates and their supporters, as well as furthering its own goal of protecting the integrity of its party primary elections.

Appellants' next equal protection argument arises from a tortured construction of Article 13.08(d), for they attempt to assail different classes of circulators where there are none to be found. Signers need never swear to their signatures; circulators must attach sworn affidavits to petitions. If a circulator of one petition signs another, he need not swear to his signature on the latter, but he must affix the circulator's affidavit to the first petition. Any other reading of Article 13.08 would indeed defy rational explanation. Appellants never suggested at trial that their peculiar reading of the law explained the absence of jurats on the nominating petitions that gave rise to this litigation.

> "If claiming an equal protection violation, the appellants' burden was to domonstrate in the first instance a discrimination against them of some substance." *American Party of Texas v. White*, 415 U.S. 767, 781 (1974).

Since a straight forward reading of the statute creates no classes at all, there can be no equal protection problem, and Appellants' contention must fail.

Appellants completely misconstrue the interest of county party officials in the collection of filing fees. While it is true that the fees collected are used to defray the cost of the primary elections in the county, the county chairman has no direct pecuniary interest in the amount so collected, for all election costs above the amounts collected and/or received as contributions are borne by the State. Article 13.08(l). A county chairman's compensation is set by the Secretary of State and is unaffected by the amount of filing fees actually collected. Article 13.08(i). Thus, Appellants' due process challenge must fail.

Most of the challenges met so far in this argument are being raised in this Court for the first time. The charge

that allowing other candidates with similarly faulty nominating petitions to remain on the ballot denied Appellants equal protection, however, was raised in the trial court and correctly dismissed. Appellees did not discriminate in their application of Article 13.08. Private parties--not the State--brought the state court actions. Appellants' names were stricken from the primary ballot only because Appellees were under valid court orders to do so. Obedience of a final judgment of a court is not state action, and cannot be considered the source of Appellants' equal protection complaint.[3]

4. LEAST DRASTIC MEANS

Appellants have failed to show that the required statements and affidavits are unduly burdensome, and yet ask this Court to prohibit procedures by which the State can ascertain that nominating petitions are true reflections of the desires of eligible, registered voters. In *American Party of Texas v. White*, 415 U.S. 767 (1974), this Court upheld a requirement that each signature on a similar petition be notarized--clearly a more burdensome requirement than those at issue here--and rejected First and Fourteenth Amendment challenges by stating that "the argument that the statute is unduly burdensome approaches the frivolous." *Id.*, at 789.

CONCLUSION

The trial court concisely summarized Appellants' arguments:

> "The basic thrust of plaintiff's suit is the implicit objection that Article 13.08(d) imposes

---

[3]*Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974), cited by Appellants, is clearly inapplicable, for the action challenged there was the State Elections Board's unequal application of a loyalty oath requirement.

such onerous requirements on candidates who seek to file petitions in lieu of a filing fee that it fails to provide the reasonable alternative to filing fees required by *Bullock*. But plaintiff presented no evidence that the statute imposes an onerous burden, and we find none inherent in the statutory procedure. To the contrary, it appears to be and we find it reasonable." (Appendix B, Jurisdictional Statement.)

Appellees suggest that the questions raised by the Jurisdictional Statement are so insubstantial as not to need further argument, and pray that the Court therefore affirm the judgment of the court below.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

P.O. Box 12548
Austin, Texas 78711

EARL LUNA
Attorney at Law

1002 Dresser Building
1505 Elm Street
Dallas, Texas 75201

Attorneys For Appellees

CERTIFICATE OF SERVICE

I, David M. Kendall, First Assistant Attorney General of the State of Texas, do hereby certify that a

true and correct copy of the above and foregoing Motion to Affirm has been placed in the United States Mail, postage prepaid, certified mail, return receipt requested, to Mr. A.L. Crouch, Attorney at Law, 109 North Taylor Street, Fort Worth, Texas 76102, Attorney for Appellants, on this the _____ day of September, 1976.

DAVID M. KENDALL